Supreme Court, U. S.
FILED
OCT 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 76-126

THE CHASE MANHATTAN BANK, a New York national banking association,

Defendant-Petitioner

—against—

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, and HESTER KAPELOW, individually, jointly and severally,

Plaintiffs-Respondents

AND

RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELEY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSLEY, JAMES D. LANDAUER, FREDERICK P. ROSE, and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE AND REALTY TRUST, a Massachusetts business trust,

Defendants.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RUSSELL E. BROOKS
1 Chase Manhattan Plaza
New York, New York 10005
Attorney for petitioner
The Chase Manhattan Bank,
National Association

Of Counsel

MILBANK, TWEED, HADLEY
& MCCLOY

INDEX

		PAGE
I.	This Court has jurisdiction to review the Florida Court's failure to apply or misapplication of Section 94 of the National Bank Act	1
II.	The decision below raises only federal issues	4
III.	The facts alleged in the complaint do not constitute waiver	4
IV.	This action is a transitory action which can be brought against Chase only in New York	7
	CONCLUSION	8

TABLE OF AUTHORITIES

Cases

	PAGE
Buffum v. *Chase National Bank*, 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952)	4, 5
Casey v. *Adams*, 102 U.S. 66 (1880)	4, 7
Charlotte National Bank v. *Morgan*, 132 U.S. 141 (1889)	5
Davis v. *O'Hara*, 266 U.S. 314 (1924)	4
Fisher v. *First National Bank of Omaha*, 338 F.Supp. 525 (S.D. Iowa 1972), *app. dismissed*, 466 F.2d 511 (8th Cir. 1972)	5, 6
Helco, Inc. v. *First National City Bank*, 470 F.2d 883 (3d Cir. 1972)	4, 5, 7
Insurance Company of North America v. *Allied Crude Vegetable Oil Refining Corporation*, 89 N.J. Super. 518, 215 A.2d 579 (N.J. Super. 1965)	6
Lichtenfels v. *North Carolina National Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963)	5
Local No. 438 Construction & General Laborers Union, AFL-CIO v. *Curry*, 371 U.S. 542 (1963)	3
Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963)	3, 4, 6
Michigan National Bank v. *Robertson*, 372 U.S. 591 (1963)	4, 7
National Bank of North America v. *Associates of Obstetrics and Female Surgery, Inc.*, ____ U.S. ____, 96 S.Ct. 1632, 48 L.Ed.2d 92 (April 26, 1976)	2, 3 4, 7, 8
Northside Iron & Metal Co., Inc. v. *Dobson & Johnson, Inc.*, 480 F.2d 798 (5th Cir. 1973)	6
Prince v. *Franklin National Bank*, 62 Misc.2d 855, 310 N.Y.S.2d 390 (Sup. Ct. Nassau Co. 1970)	6

	PAGE
Radzanower v. *Touche, Ross & Co.*, ____ U.S. ____, 96 S.Ct. 1989, 48 L.Ed.2d 540 (June 7, 1976)	8
Rome v. *Eltra Corp.*, 297 F.Supp. 314 (E.D.Pa. 1969)	6
Sulil Realty Corp. v. *Rye Motors, Inc.*, 45 Misc.2d 458, 257 N.Y.S.2d 111 (West.Co.Ct. 1965), *aff'd*, 47 Misc.2d 715, 262 N.Y.S.2d 989 (2d Dep't 1965)	6
Tanglewood Mall, Inc. v. *Chase Manhattan Bank*, 371 F.Supp. 722 (W.D. Va. 1974), *aff'd*, 508 F.2d 838 (4th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975)	7
Williams v. *Kaiser*, 323 U.S. 471 (1945)	4

Statutes

Section 94 of the National Bank Act, 12 U.S.C. § 94	*passim*
28 U.S.C. § 1257	3

Rules

Rule 19.1(a), Rules of The Supreme Court of the United States	2

In The

Supreme Court of the United States

October Term, 1975

No. 76-126

The Chase Manhattan Bank, a New York national banking association,

Defendant-Petitioner

—against—

Sailboat Apartment Corp., a Florida corporation, Carol Housing Corporation, a Florida corporation, Stephen Kapelow, individually, Paul Kapelow, individually, and Hester Kapelow, individually, jointly and severally,

Plaintiffs-Respondents

AND

Raymond T. O'Keefe, Adam C. Heck, Gerald W. Blakeley, Jr., William F. Butler, Jr., Frank F. Flynn, Jr., Peter C. Haeffner, Jr., Harry B. Helmsley, James D. Landauer, Frederick P. Rose, and Charles M. Williams, as Trustees of Chase Manhattan Mortgage and Realty Trust, a Massachusetts business trust,

Defendants.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I

This Court has jurisdiction to review the Florida Court's failure to apply or misapplication of Section 94 of the National Bank Act

Respondents' argument—that the Court lacks jurisdiction because of the absence of finality—falls by its own

weight. Respondents argue that Chase must await trial in Florida for a determination of Chase's right not to be tried in Florida. Respondents contend that a trial or a summary judgment proceeding is necessary because the venue issue cannot be determined without fact-finding by the Florida court. Yet, respondents cite the Florida rule that the allegations of the complaint must be taken as true. The petition (Pet.[1] 9-10) also recognized this rule. Since that is so, no issue of fact remains to be tried on the venue question. Chase is a national bank located in New York. The allegations of the complaint are deemed true. The point is, as the petition shows (Pet. 9-10), that no facts even approaching an exception to Section 94 of the National Bank Act are pleaded in the complaint. (Br.[2] Appendix)

Only five months ago, in *National Bank of North America* v. *Associates of Obstetrics and Female Surgery, Inc.*, ____ U.S. ____, 96 S.Ct. 1632, 48 L.Ed.2d 92 (April 26, 1976), this Court granted certiorari and vacated the judgment below which had denied a motion to dismiss in a virtually identical situation. There, as here, a state court refused to follow this Court's repeated direction that a national bank must be afforded its Section 94 right of being sued only where it maintains its principal office.[3]

The federal question here is the same as that presented in *National Bank of North America:* the power of a state court to proceed with and determine an action against

---

[1] "Pet." refers to the designated pages of the Petition.

[2] "Br." refers to designated pages of Respondents' Brief in Opposition to the Petition.

[3] Rule 19.1(a) of the Rules of this Court provides that a consideration in determining whether to review a state court's order is whether the state court has decided a federal question of substance, " . . . [I]n a way probably not in accordance with applicable decisions of this court."

a national bank which, under the direction of Congress, can only be sued elsewhere.[4] Despite respondents' assertions to the contrary (Br. 4-8), by plain logic and by case law, the Florida court's refusal to dismiss this action against Chase is a "final judgment or decree" reviewable now by this Court under 28 U.S.C. § 1257. *National Bank of North America* v. *Associates of Obstetrics and Female Surgery, Inc., supra; Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963) ("... we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings."); *Local No. 438 Construction & General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542 (1963).[5]

The issue of whether Chase is liable to respondents on the merits is separate and independent from the issue of whether that liability is determined by a New York or a Florida court. *Local No. 438 Construction & General Laborers' Union, AFL-CIO* v. *Curry, supra.*

---

[4] By order dated September 21, 1976, the Florida trial court has set the trial to begin on March 7, 1977.

[5] Respondents point (Br. 6-7) to a typographical error in the petition (Pet. 2, n. 2) where 28 U.S.C. § 1257(2) is cited as the basis for this Court's jurisdiction. The citation, as shown by the language of the Petition (Pet. 2, n. 2), should be 28 U.S.C. § 1257(3), which affords jurisdiction and provides, in relevant part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question . . . , or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

II

The decision below raises only federal issues

The only question presented to the Florida court, and the only question on which it could rule, was whether Section 94 prohibited this action against Chase in Florida. The Florida court denied the motion to dismiss. That decision can be based on only two possible grounds. The Florida court either refused to give effect to Section 94, or misapplied it by finding that Chase waived or that the action was local. All possible grounds for the decision present federal and only federal questions, reviewable now by this Court. *National Bank of North America* v. *Associates of Obstetrics and Female Surgery, Inc., supra; Mercantile National Bank* v. *Langdeau, supra; Michigan National Bank* v. *Robertson,* 372 U.S. 591 (1963); *Davis* v. *O'Hara,* 266 U.S. 314 (1924); *Casey* v. *Adams,* 102 U.S. 66 (1880). Since only federal questions are presented, and there are no substantial state grounds on which the decision below could be based, this Court will accept jurisdiction absent an opinion by the court below. *Williams* v. *Kaiser,* 323 U.S. 471 (1945).

III

The facts alleged in the complaint do not constitute waiver

Waiver is the voluntary and intentional relinquishment or abandonment of a known existing right. Respondents have the burden of showing that Chase voluntarily and intentionally relinquished or abandoned its right to be sued only in New York. *Buffum* v. *Chase National Bank,* 192 F.2d 58 (7th Cir. 1951), *cert. denied,* 342 U.S. 944 (1952); *Helco, Inc.* v. *First National City Bank,* 470 F.2d 883 (3d Cir. 1972). Where, as here, the only proof of Chase's intention to waive rests on its alleged conduct, Chase's actions must be so manifestly consistent with and indicative of an intention to relinquish voluntarily its right to be sued in

New York that no other reasonable explanation for Chase's conduct is possible. *Buffum* v. *Chase National Bank, supra* at 61; *Helco, Inc.* v. *First National City Bank, supra.*

Two visits to Florida by a junior officer of Chase as an investment advisor to a Massachusetts real estate investment trust with respect to the trust's investment in Florida land (Br. 15)—which is all the complaint alleges—is not conduct which can only be explained as an intentional abandonment by Chase of its right to be sued only in New York. Such conduct, involving a transaction to which Chase was not even a party, is far different from the conduct which courts have required to find an intention to relinquish Section 94 rights.

With few exceptions, where an intention to waive Section 94 rights has been found, as in the cases cited by respondents (Br. 14), the actions evidencing the intention have been clear and unequivocal. Consonant with the *Buffum* standard, the only reasonable explanation for the conduct was an intention to waive Section 94, such as defending a lawsuit without objecting to venue until the case reached the appellate court, *Charlotte National Bank* v. *Morgan,* 132 U.S. 141 (1889), or accepting appointment as testamentary trustee subject to a court's supervision, *Lichtenfels* v. *North Carolina National Bank,* 260 N.C. 146, 132 S.E.2d 360 (1963).

On the other hand, conduct such as is alleged here, involving an isolated transaction far from the place where the bank carries on its normal business, is hardly such that it could only be explained as manifesting an intention to be sued in the distant forum. In cases such as this, lower courts, both state and federal, hold that mere transaction of business is not equivalent to consent to be sued. *Helco, Inc.* v. *First National City Bank, supra* (doing business through one branch office was not sufficient to show waiver); *Fisher*

v. *First National Bank of Omaha,* 338 F.Supp. 525 (S.D.Iowa 1972), *app. dismissed,* 466 F.2d 511 (8th Cir. 1972) (operation of credit card plan did not amount to waiver); *Rome* v. *Eltra Corp.,* 297 F.Supp. 314 (E.D.Pa. 1969) (accepting appointment as indenture trustee was not a waiver); *Prince* v. *Franklin National Bank,* 62 Misc.2d 855, 310 N.Y.S.2d 390 (Sup. Ct. Nassau Co. 1970) (custody and sale of stocks allegedly converted did not amount to waiver); *Insurance Company of North America* v. *Allied Crude Vegetable Oil Refining Corporation,* 89 N.J. Super. 518, 215 A.2d 579 (N.J.Super. 1965) (securing loans on property within the foreign jurisdiction was not waiver); *Sulil Realty Corp.* v. *Rye Motors, Inc.,* 45 Misc.2d 458, 257 N.Y.S.2d 111 (West. Co.Ct. 1965), *aff'd,* 47 Misc.2d 715, 262 N.Y.S.2d 989 (2d Dep't 1965) (repossessing and selling pledged property and financing automobiles was not a waiver).

Respondents suggest (Br. 15) that because Chase's actions may have been sufficient for the exercise of *in personam* jurisdiction by the Florida court, those actions are sufficient to waive Chase's Section 94 rights. Waiver of Section 94 rights cannot be equated with tortious conduct, as respondents suggest (Br. 15-16), for the commission of a tort does not evidence an intent to be sued where the tort is committed. *Northside Iron & Metal Co., Inc.* v. *Dobson & Johnson, Inc.,* 480 F.2d 798 (5th Cir. 1973); *Fisher* v. *First National Bank of Omaha, supra; Prince* v. *Franklin National Bank, supra.* If respondents' argument were correct, it would mean that any time a national bank has established minimum contacts with the forum state, so that due process requirements for the exercise of jurisdiction are satisfied, waiver of Section 94 would be automatic. If that were the case, the waiver exception to Section 94 would swallow the statute. In fact, the result sought by respondents has been rejected. *Mercantile National Bank* v. *Langdeau, supra; Fisher* v. *First National Bank of Omaha, supra; Sulil Realty Corp.* v. *Rye Motors, Inc., supra.*

IV

The action is a transitory action which can be brought against Chase only in New York

Respondents argue (Br. 17-20) that Chase can be sued in Florida because this is a local rather than transitory action. This argument rests on a misunderstanding of respondents' own claim against Chase as pleaded in the complaint and the "local action" exception set forth in *Casey* v. *Adams,* 102 U.S. 66 (1880).

In *Casey,* the national bank was a mortgagee of the property in dispute. The disputed property was located in a county other than where the bank was located, and the court in that county—which alone had jurisdiction to determine rights to the property—could adjudicate those rights only by exercising jurisdiction over the bank. If it could not do so, rights to the property would never be settled. Thus, this Court allowed the bank to be sued, as to its claim to the property, in the county where the property was located.

Here, unlike the bank in *Casey,* Chase is not the mortgagee of the property in dispute and makes no claim to any property; the mortgagee is the real estate investment trust for which Chase served as investment advisor. Hence, this action is not local in nature with regard to Chase, for determination of rights to the Florida *res* can be determined whether or not Chase is before the Florida court.

Respondents concede that they seek *in personam* relief against Chase, rather than relief *in rem.* They state (Br. 3) the bases of their action are breach of contract, fraud and usury—all manifestly transitory claims which can be readily asserted in New York. As such, Section 94 requires that these claims be brought against Chase in New York. *National Bank of North America* v. *Associates of Obstetrics and Female Surgery, Inc., supra; Michigan National Bank* v. *Robertson, supra; Helco, Inc.* v. *First National City Bank, supra; Tanglewood Mall, Inc.* v. *Chase Manhattan Bank,* 371 F.Supp. 722 (W.D. Va. 1974), *aff'd,* 508 F.2d 838 (4th Cir. 1974), *cert. denied,* 421 U.S. 965 (1975).

Conclusion

The petition should be granted and the decision below reversed to preclude the Florida court's transgression of an important federal statute, the vitality of which has been recently reaffirmed by this Court in *Radzanower* v. *Touche, Ross & Co.*, ____ U.S. ____, 96 S.Ct. 1989, 48 L.Ed.2d 540 (June 7, 1976) and *National Bank of North America* v. *Associates of Obstetrics and Female Surgery, Inc., supra.*

Respectfully submitted,

RUSSELL E. BROOKS
1 Chase Manhattan Plaza
New York, New York 10005
Attorney for petitioner
The Chase Manhattan Bank,
National Association

October 5, 1976

Of Counsel

MILBANK, TWEED,
HADLEY & MCCLOY